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NO. 353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

ELIJAH WHITE RATCLIFF,

Petitioner

v.

E. IVAN BRUCE AND TRUMAN BLOCKER, JR.,

Respondents

MOTION TO DISMISS OR AFFIRM

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents, E. Ivan Bruce and Truman Blocker, Jr., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the case be dismissed on the ground that the case does not present a substantial Federal question, and in the alternative, the Respondents, E. Ivan Bruce and Truman Blocker, Jr., moves that the judgment and decree of the Court of Civil Appeal for the Fourteenth Supreme Judicial District of Texas be affirmed on the ground that the questions are so unsubstantial as not to warrant futher argument.

STATEMENT OF THE CASE

This action is a malpractice suit which was instituted by Petitioner, Elijah White Ratcliff, for damages against E. Ivan Bruce and Truman Blocker, Jr., Respondents, for allegedly treating Petitioner at the Uni-

versity of Texas Medical Branch at Galveston, Texas, without his consent.

The facts of this case are stated in the opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, which opinion is set forth in Petitioner's Appendix B, at pp. 45-52, and is reported at 423 S.W.2d 614.

OPINIONS BELOW

This suit was filed in the 56th Judicial District Court of Galveston County, Texas. Motion for Summary Judgment was duly filed and presented on behalf of Respondent, Dr. Truman Blocker, Jr., and this motion was sustained. The case was tried on its merits, insofar as the Respondent Dr. E. Ivan Bruce was concerned, before a jury, and the jury found that Petitioner, Elijah White Ratcliff, was not treated without his consent. The Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, on January 17, 1968, affirmed the judgment of the trial court. The Supreme Court of Texas, on May 15, 1968, refused Petitioner's (Elijah White Ratcliff's) Application for Writ of Error (no reversible error). On June 5, 1968, Petitioners Motion for Rehearing of Application for Writ of Error was overruled by the Supreme Court of Texas.

JURISDICTION

It is asserted by Respondents that the Petition for Writ of Certiorari fails to comply with Rule 23(f) of the Supreme Court of the United States, in that the Petition does not specify the stage in the proceedings in the Court of first instance and in the Appellate Court or Courts, at which, and the manner in which, the Federal questions sought to be reviewed were

raised; the method of raising them; and the way they were passed on by the Court.

In the alternative, it is questioned by Respondents that any substantial Federal question is presented for adjudication by the Supreme Court of the United States.

STATUTES INVOLVED

The Statute and Texas Rules of Civil Procedure involved are produced in the appendix to this motion.

ARGUMENT

Petitioner brought a malpractice suit in the 56th Judicial District Court of Galveston County, Texas, against Respondents, Dr. E. Ivan Bruce and Dr. Truman Blocker, Jr., Executive Director of the University of Texas Medical Branch at Galveston, Texas, alleging that Petitioner had been treated without his consent and sought to recover damages in the amount of $660,000.00.

Respondent Dr. Truman Blocker, Jr., filed a motion for summary judgment which motion was sustained by the trial court. The State Court correctly held that under Texas law, Dr. Truman Blocker, Jr., the director of the University of Texas Medical Branch in Galveston, Texas, was not liable under respondeat superior for the acts or ommissions of subordinates. The Court of Civil Appeals cited as authority *State v. Morgan* (Tex.Com.App.), 140 Tex. 620, 170 S.W.2d 652 (1933); *Tumlinson v. City of Brownsville,* 178 S.W.2d 546 (Tex.Civ.App. 1944, err. ref.); *Clough v. Worsham,* 74 S.W. 350 (Tex.Civ.App. 1903, err. ref.). The case was tried on its merits before a jury, insofar as Dr. E. Ivan Bruce, is concerned, on the question of whether Dr. E. Ivan Bruce gave psychiatric treatment to Pe-

titioner without his consent. The jury found that Petitioner had consented to such treatment and the record abundantly supports the jury's findings.

Petitioner appealed the judgment of the Trial Court to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas. The Court of Civil Appeals affirmed the judgment of the Trial Court. Petitioner appealed the decision of the Court of Civil Appeals by filing an application for Writ of Error with the Supreme Court of Texas. The Supreme Court of Texas refused to grant the application for Writ of Error on grounds that there was no reversible error. Petitioner filed a Motion for Rehearing with the Supreme Court of Texas, which motion was overruled.

The Petition for Writ of Certiorari should be dismissed or the judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas affirmed because at no stage in the proceedings, either in the Courts of the first instance or in the Appellate Courts did the Petitioner raise any Federal questions, either by his pleadings, by a request to charge and exceptions, by assignment of error, or in any other manner, and it is respectfully submitted that this Petition for Writ of Certiorari should be dismissed or the judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas affirmed.

The errors complained of by the Petitioner in the State Courts were procedural and evidentiary matters under Texas Rules of Procedure and the Texas Courts correctly overruled these alleged errors.

The cases are clear that a decision of a state court resting on grounds of state procedure does not present a Federal question. *French v. Hopkins,* 124 U.S. 524; *Iowa Cent. R. Co. v. Iowa,* 160 U.S. 389; *Gibson v.*

Mississippi, 162 U.S. 565; *Wood v. Brady,* 150 U.S. 18. The cases are also equally clear that the construction of state laws are the exclusive responsibility of state courts. *Speiser v. Randall,* 357 U.S. 513; *Lerner v. Casey,* 357 U.S. 468. Applying the foregoing principles to the instant case, the Respondents respectfully submit that there is no substantial Federal question presented.

The issues dealt with by the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas and the Supreme Court of Texas dealt with procedural and evidentiary matters, and no constitutional questions were raised, or passed on by the Texas Courts.

CONCLUSION

We respectfully submit that the Petitioner did not present a substantial Federal question and that this Petition for Writ of Certiorari should be dismissed or the judgment and decree of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas should be affirmed.

Respectfully submitted,

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SERVICE

I, A. J. Carubbi, Jr., Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing Motion has been forwarded by United States Mail, First Class, postage pre-paid to Petitioner's Attorney, Mr. Elijah White Ratcliff, P. O. Box 391, Livingston, Texas 77351.

A. J. CARUBBI, JR.
Assistant Attorney General of Texas

APPENDIX

State Statutes

Art. 2134. Revised Civil Statutes of Texas, 1925.

"The following persons shall be disqualified to serve as jurors in any particular case:

"1. Any witness in the case.

"2. Any person interested, directly or indirectly, in the subject matter of the suit.

"3. Any person related by consanguinity or affinity within the third degree to either of the parties to the suit.

"4. Any person who has a bias or prejudice in favor of or against either of the parties.

"5. Any person who has sat as a petit juror in a former trial of the same, or of another case, involving the same questions of fact."

Texas Rules of Civil Procedure

Rule 234

"When the parties have made or declined to make their peremptory challenges, they shall deliver their lists to the clerk. The clerk shall, if the case be in the district court, call off the first twelve names on the lists that have not been erased; and if the case be in the county court, he shall call off the first six names on the lists that have not been erased; those whose names are called shall be the jury.

"The brief for appellant should contain in the order here stated:

"(a) A short, plain statement of the nature of the case without argument. A resume of the pleadings or evidence is seldom necessary and should be avoided.

"(b) A statement of the points upon which the appeal is predicated, separately numbered in short form and without argument, and germane to one or more assignments of error when assignments are required. Such points will be sufficient if they direct the attention of the court to the error relied upon and they should ordinarily be so concisely stated that they may appear, separately numbered, on a single page of the brief. Assignments of error need not be copied in the brief, and may be cited by reference only.

"(c) A brief of the argument, presenting separately or grouped, if germane, the points relied upon for reversal, the argument to include (i) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (ii) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any charge given or refused, such charge shall be set out in full. If complaint is made of the improper admission or rejection of evidence, the full substance of such evidence so admitted or rejected shall be set out with reference to the pages of the record where the same may be found. Repetition or prolixity of statement or argument must be avoided."